

# PREVENTING OWNERSHIP CHANGES

# INTRODUCTION

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With U.S. corporate bankruptcies poised to hit a decade-long high as a result of the economic impact of COVID-19, we have prepared these materials that detail the key bankruptcy tax issues and guidance offered by Linda Swartz, the chair of Cadwalader's Tax Group, in old and new speeches and panels. We hope you find this presentation to be both useful and informative.

For additional information, contact [Linda Swartz](mailto:linda.swartz@cwt.com) ([linda.swartz@cwt.com](mailto:linda.swartz@cwt.com)).

## Upcoming speaking engagements:

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| <b>October 14, 2020</b> | <ul style="list-style-type: none"><li>• <b>Linda Swartz</b> will be presenting "Tax Strategies for Financially Troubled Businesses and Other Loss Companies" at PLI's <a href="#">Tax Strategies for Corporate Acquisitions, Dispositions, Spin-Offs, Joint Ventures, Financings, Reorganizations &amp; Restructurings 2020</a></li></ul> |
| <b>November 5, 2020</b> | <ul style="list-style-type: none"><li>• <b>Linda Swartz</b> will be presenting "A Cause for Distress? The Ways the Federal Income Tax Pushes Taxpayers into Bankruptcy" at <a href="#">The University of Chicago Tax Conference</a></li></ul>   |
| <b>January 25, 2021</b> | <ul style="list-style-type: none"><li>• <b>Linda Swartz</b> will be presenting "Distressed Corporations: Creditor and Shareholder Issues" at the <a href="#">2021 University of Southern California Federal Tax Institute</a></li></ul>   |
| <b>February 8, 2021</b> | <ul style="list-style-type: none"><li>• <b>Linda Swartz</b> will be presenting "Workouts and Debt Restructurings" at PLI's <a href="#">23rd Annual Real Estate Tax Forum</a></li></ul>  |
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# LINDA Z. SWARTZ

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**Linda Z. Swartz**  
Chair, Tax  
New York  
(212) 504 6062  
linda.swartz@cwt.com

Linda Swartz, the longtime chair of Cadwalader's Tax Group and member of the Firm's Management Committee, focuses her practice on structuring complex restructurings, bankruptcies, mergers and acquisitions, spin-offs, joint ventures, and foreign tax planning strategies. She also regularly advises clients on fund structures, financings and derivative transactions.

Linda is consistently recognized as one of the leading tax lawyers in the country. She was recently named one of 14 "Influential Women In Tax Law" by *Law360*, noted for her role as "a key architect on billion-dollar transactions involving major multinational companies" with clients describing her tax structuring expertise as "so strong that we don't even go to the IRS to get a blessing from them. We go to Linda to get a blessing from her." She has been described by *Chambers USA* as "acclaimed for her vast reservoir of practical knowledge of the U.S. tax code" and "an expert on the law of today but cognizant of where the law might go in the future, allowing clients to make decisions which last for the next ten years." Clients quoted by *The Best Lawyers* in America have described Linda as "the foremost U.S. tax advisor on structured acquisition and divestiture deals" and "a professional force of nature" with "extraordinary technical ability, coupled with fiercest and most trenchant deal negotiation skills of any transactional tax lawyer." She was also recognized as "2017 Foreign Tax Planning Lawyer of the Year" by *Finance Monthly*, and *Dow Jones*, reporting on Procter & Gamble's Reverse Morris Trust transaction with Coty, noted that "it isn't often you see a tax adviser credited on a deal, but that's exactly what happened for Cadwalader, Wickersham & Taft in P&G's complicated \$12.5 billion unloading of its beauty business to Coty."

Linda is widely regarded as a thought leader in the industry and is a prolific speaker and writer on a wide range of transactional tax issues, with articles that include "Partnership Bankruptcy Tax issues," "Debt Exchanges," "Bankruptcy Tax Issues," and "Bankruptcy Tax 101." She also authors the chapters on Debt Exchanges in *Collier on Bankruptcy Taxation* (Matthew Bender) and Securities Lending Transactions in *Taxation of Financial Institutions* (Clark Boardman Callaghan). In addition to writing, she speaks on a broad range of topics, including each year on workout and bankruptcy tax issues at the corporate and real estate tax PLI conferences.

Linda is a member of the Executive Committee of the New York State Bar Association Tax Section and has chaired its Tax-Free Reorganizations; Corporations; Bankruptcy; Consolidated Returns; Real Property; and Tax Accounting and Basis Committees.

Linda received her J.D. from University of Pennsylvania Law School, and her B.A. from Bucknell University, where she graduated *magna cum laude* and was elected to Phi Beta Kappa.

# POISON PILLS AND CHARTER AMENDMENTS

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Corporations with significant NOLs (or built-in loss assets) and depressed stock prices are often concerned that inadvertent section 382 ownership changes could reduce the future value of their NOLs.

Two basic responses:

## Poison Pills

Section 382 “Poison Pill” – setting triggering percentage at 4.9%, to keep major purchases from taking place.

- Ford, Lear, Ryland Group, USG, and Selectica each adopted section 382 poison pills after the 2008 downturn.

## Charter Amendments

Amend charter to void *ab initio* any unapproved share transfer that would:

- increase the holdings of an existing 5% shareholder;
- create a new 5% shareholder; or
- create a new public group treated as a 5% shareholder.
  - Hovnanian and EDCI Holdings amended their charters in a similar manner after the 2008 downturn.

# POISON PILLS AND CHARTER AMENDMENTS (cont'd)

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Methods involve tradeoff between effectiveness and ease of implementation.

## Poison Pills

- Can normally be effected by board of directors on its own authority;
- are subject to shareholder challenge; and
- do not actually prevent ownership change from occurring if players are willing to accept consequences of share dilution.

## Charter Amendments

- Implementation and removal generally requires shareholder vote; and
- generally prevents ownership change from taking place under all circumstances.